

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7

8 JORGE ALVAREZ-CONTRERAS,

9 Defendant.

10

11 No. CR-05-2015-FVS

12

13 FINDINGS, CONCLUSIONS, AND

14 ORDER

15

16 **THE DEFENDANT** appeared before the Court for sentencing on August

17 11, 2005. He was represented by Anne Walstrom; the government by

18 Jane Kirk. This document serves to memorialize the Court's oral

19 findings and conclusions.

20

21 **FINDINGS**

22 Except as otherwise indicated at the defendant's sentencing

23 hearing, the Court adopts the findings of fact that are set forth in

24 the Presentence Investigation Report.

25

26 **GUIDELINE CALCULATIONS**

27

28 A. Specific Offense Characteristic

29 During 1998, the defendant was convicted in the State of

30 California of First Degree Residential Burglary as defined by

31 California Penal Code § 459. The parties disagree with respect to

32 whether this conviction constitutes a "burglary of a dwelling" and,

33 thus, a "crime of violence" within the meaning of the Sentencing

34 Guidelines.

1 There are two potentially appropriate methods by which the Court
 2 may determine whether the defendant's prior conviction constitutes
 3 burglary of a dwelling. *United States v. Wenner*, 351 F.3d 969, 972
 4 (9th Cir.2003). The first approach typically is referred to as the
 5 "categorical approach." *Taylor v. United States*, 495 U.S. 575, 602,
 6 110 S.Ct. 2143, 2160, 109 L.Ed.2d 607 (1990). Under this approach,
 7 the Court must determine whether the Guidelines' definition of the
 8 term "burglary" is narrower, congruent with, or broader than the
 9 State of California's definition.

10 In *Taylor*, the Supreme Court adopted a widely-accepted,
 11 contemporary definition of the term "burglary" in order to resolve an
 12 issue of statutory construction. 495 U.S. at 598, 110 S.Ct. at 2158.
 13 At the very least, said the Supreme Court, a burglary involves an
 14 unlawful entry into a building or structure with the intent to commit
 15 a crime. *Id.* This is the definition upon which the Ninth Circuit
 16 relied to define the term "burglary of a dwelling" as used in the
 17 Sentencing Guidelines. *Wenner*, 351 F.3d at 972-3. However, not
 18 every "generic" burglary triggers an enhancement under U.S.S.G. §
 19 2L1.2(b)(1). Only a burglary of a dwelling serves as a predicate
 20 offense. *United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 852
 21 (9th Cir.2005) (citing *Wenner*, 351 F.3d at 973). This crime has
 22 three elements:

- 23 1. an unlawful or unprivileged entry into, or remaining in,
- 24 2. a building that constitutes a dwelling,
- 25 3. with the intent to commit a crime.

26 *Rodriguez-Rodriguez*, 393 F.3d at 852 (citing *Taylor*, 495 U.S. at 598,
 27 110 S.Ct. at 2158; *Wenner*, 351 F.3d at 973).

The Guidelines' definition of burglary is narrower than the

1 definition of burglary to which the defendant pleaded guilty in state
2 court, i.e., § 459 of the California Penal Code. *United States v.*
3 *Smith*, 390 F.3d 661, 664 (9th Cir.2004), as amended 405 F.3d 726 (9th
4 Cir.2005). As a result, conduct which may constitute burglary under
5 § 459 may not constitute the burglary of a dwelling under the
6 Guidelines. Thus, under the categorical approach, the Court cannot
7 be certain the defendant committed a burglary of a dwelling when he
8 admitted a violation of § 459.

9 Given the uncertainty, the Court must consider a second
10 approach. In the Ninth Circuit, it is referred to as the "modified
11 categorical approach." *United States v. Corona-Sanchez*, 291 F.3d
12 1201, 1211 (9th Cir.2002) (en banc). Under this approach, the Court
13 must determine whether the defendant admitted facts in state court
14 that constitute burglary of a dwelling under the Sentencing
Guidelines.

15 The government has submitted a number of documents for the
16 Court's consideration. However, review is limited to "the terms of
17 the charging document, the terms of a plea agreement or transcript of
18 colloquy between judge and defendant in which the factual basis for
19 the plea was confirmed by the defendant, or to some comparable
20 judicial record of this information." *Shepard v. United States*, 544
21 U.S. ----, ----, 125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005).
22 Consequently, the Court has focused upon the "Felony Complaint," the
23 "Judgment Proceedings," and the "Abstract of Judgment." Cf. *United*
24 *States v. Velasco-Medina*, 305 F.3d 839, 852 (9th Cir.2002) ("Velasco-
25 Medina's Abstract of Judgment demonstrates that he pleaded guilty to
26 second degree burglary as charged in his Information."). Read
together, the three documents listed above indicate that the

1 defendant made the following admissions when he pleaded guilty in
2 state court:

- 3 1. he unlawfully entered
- 4 2. an inhabited dwelling house (also described as the
5 inhabited portion of a building occupied by John
Camarillo),
- 6 3. with the intent to commit larceny.

7 (Felony Complaint, at 1.)

8 While the defendant acknowledges the allegations contained in
9 the Felony Complaint, including the one that he entered an inhabited
10 dwelling house, he argues the Guidelines' definition of the word
11 "dwelling" is narrower than California's definition. Under the
12 Guidelines, says the defendant, the word "dwelling" refers only to
13 the "living space of a home." According to him, state law is much
14 broader. He submits that, in California, sections of a building that
15 are not used as "living space" -- a partially open carport, for
16 example -- may be treated as part of an inhabited dwelling house.
17 That being the case, says the defendant, the Court cannot be sure the
18 allegations contained in the Felony Complaint constitute burglary of
a dwelling under the Guidelines.

19 The defendant's argument depends upon a narrow definition of the
20 word "dwelling." This approach to Guidelines interpretation is
21 inconsistent with *Wenner*. In that case, the Ninth Circuit drew upon
22 *Taylor*'s generic definition of the term "burglary." 351 F.3d at 973.
23 By doing so, the circuit court implicitly endorsed the use of widely-
24 accepted, contemporary definitions in situations such as this. It
25 makes no sense to define the word "burglary" in a broad manner, as
26 the Ninth Circuit did in *Wenner*, and then define the word "dwelling"

1 in the narrow manner proposed by the defendant. The Court declines
2 to do so. Instead, the Court assumes the word "dwelling" means
3 essentially the same thing under both the Sentencing Guidelines and §
4 459 of the California Penal Code.

5 The defendant admitted in state court that he unlawfully entered
6 an inhabited dwelling house, which he acknowledged was the inhabited
7 portion of a building occupied by John Camarillo, with the intent to
8 commit larceny. Under the modified categorical approach, these
9 admissions are sufficient to establish that the crime to which he
10 pleaded guilty constitutes burglary of a dwelling within the meaning
11 of the Sentencing Guidelines.

12 While not compelled by *Wenner*, this conclusion is supported by
13 that case. As the Ninth Circuit observed, Mr. Wenner had been
14 charged in state court "with 'enter[ing] or remain[ing] unlawfully in
15 a dwelling other than a vehicle, the residence of Mike Jewell.'" 351
16 F.3d at 974. The government cited this language in an effort to
17 establish, under the modified categorical approach, that he committed
18 the burglary of a dwelling. The circuit court did not disagree with
19 the proposition that the quoted language would have been sufficient,
20 had it constituted an admission on Mr. Wenner's part, to qualify his
21 prior conviction as a predicate offense. However, the government
22 failed to prove Mr. Wenner ever admitted the allegation quoted above.
23 *Id.* Here, by contrast, the government has provided documentation
24 sufficient to establish that the defendant admitted the allegations
25 set forth in the Felony Complaint. Furthermore, the allegations that
26 the defendant has admitted are at least as sweeping, and arguably
more so, than the allegations quoted in *Wenner*. Thus, the Court is
satisfied that the defendant's 1998 burglary conviction qualifies as

1 a crime of violence. Sixteen levels are added to his base offense
2 level. U.S.S.G. § 2L1.2(b)(1)(A).

3 *B. Departure*

4 The Court departs downward by two levels based upon cultural
5 assimilation. Although the Court is mindful that it has discretion
6 to depart downward based upon the other grounds advanced by the
7 defendant, the Court declines to do so.

8 *C. Advisory Guideline Range*

9 The defendant's post-departure offense level is 19. He falls
10 within Criminal History Category V. His advisory Guideline Range is
11 57-71 months imprisonment.

12 **IMPOSITION OF A SENTENCE**

13 The Court has reviewed the factors set forth in 18 U.S.C. §
14 3553(a). Having done so, the Court is satisfied that a sentence of
15 57 months imprisonment is sufficient, but not greater than necessary,
16 to fulfill the objectives listed in § 3553(a)(2).

17 **IT IS HEREBY ORDERED:**

18 The defendant's motion to depart (Ct. Rec. 35) is granted to the
19 extent indicated above.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this document and furnish copies to counsel.

22 **DATED** this 22nd day of August, 2005.

23 s/ Fred Van Sickle
24 Fred Van Sickle
25 United States District Judge